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Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO 24NCC-54–02 OF 2013
MARY LIM J
9 APRIL 2013

Civil Procedure — Injunction — Injunction to restrain winding up petition — Governing principles — Undisputed debt — Genuine and proven cross-claim existing — Whether presentation of petition caused irreparable damage to plaintiff's business and reputation — Whether injunction granted on terms

Companies and Corporations — Winding up — Injunction to restrain petition — Application for fortuna injunction — Governing principles — Undisputed debt — Genuine and proven cross-claim existing — Whether presentation of petition caused irreparable damage to plaintiff's business and reputation — Whether injunction granted on terms

The plaintiff and the defendant were involved in two cases before the High Court at Seremban. One was the 'Port Dickson Suit' and the other was the 'Jelebu Suit'. In the Port Dickson Suit, after full trial, the plaintiff's claim was dismissed and the defendant's counterclaim allowed. The defendant promptly issued a notice pursuant to s 218 of the Companies Act 1965 seeking payment for the sum ordered by the court. The plaintiff filed an appeal on the same day that judgment was pronounced and applied for stay of the execution of the judgment. The application was yet to be heard. In the Jelebu Suit, the defence and counterclaim was struck out and judgment was entered in the plaintiff's favour subject to assessment by the senior assistant registrar. The defendant's application to set aside the judgment was refused at first instance and that decision was upheld by the Court of Appeal. The defendant's application for leave to appeal to the Federal Court was refused. The assessment of damages had yet to be scheduled for hearing. The plaintiff in the present action sought, inter alia, a fortuna injunction to restrain the defendant from presenting a petition to wind up the plaintiff. The plaintiff claimed it had a valid cross-claim from the interlocutory judgment. According to the plaintiff, it was actively involved in construction projects and, if not restrained, the threatened winding up proceedings would occasion irreparable damage to the plaintiff.

Held, allowing the application on terms and with no order as to costs:

(1) Where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt

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demanded is generally refused. The arguments challenging the issuance of the s 218 notice should be made in the winding up court. Otherwise, the only viable option is to pay up. Where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation (see para 49).

(2) The burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail (see para 49).

(3) The cross-claim was in the nature of an interlocutory judgment. Such a cross-claim was certainly not only real, genuine and serious but based on substantial grounds. While the defendant may have a final judgment after a full trial, the interlocutory judgment in the plaintiff's hands and awarded in its favour was no less a valid judgment of a competent court. That judgment had in fact been confirmed indirectly by the Federal Court when the defendant's leave to appeal was dismissed; and directly, by the Court of Appeal (see para 51).

(4) In the Jelebu Suit, the High Court had entered judgment on liability against the defendant. What damages, if any, was due to the plaintiff was a matter of assessment by the senior assistant registrar. Given these circumstances, it could not be said that the judgment was illusory and uncertain; or was an order that had yet to graduate into a judgment. Just because the monetary part of the judgment in the Jelebu Suit had not been assessed did not make that judgment any less a judgment of the court (see para 52).

(5) The plaintiff's appeal to the Court of Appeal in the Port Dickson Suit was pending. The plaintiff had filed an application to stay the execution of the judgment in the Port Dickson Suit. While this was generally not relevant, it was material when the factual matrix was viewed in its entire and proper perspective (see para 54).

(6) The defendant was therefore restrained from presenting a winding up petition in respect of the Port Dickson Suit subject to the plaintiff paying within two weeks from the date of the order the full sum adjudged to the solicitors of the plaintiff to be held as stakeholders pending assessment of damages in the Jelebu Suit (see para 58).

[Bahasa Malaysia summary

Plaintif dan defendan terlibat dalam dua kes di Mahkamah Tinggi Seremban. Satu ialah 'Guaman Port Dickson' dan satu lagi adalah 'Guaman Jelebu'. Dalam Guaman Port Dickson, selepas perbicaraan penuh, tuntutan plaintif

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ditolak dan defendan menuntut balas. Defendan kemudiannya mengeluarkan notis di bawah s 218 Akta Syarikat 1965 memohon bayaran bagi jumlah yang diperintahkan oleh mahkamah. Plaintif memfailkan rayuan pada hari yang sama agar penghakiman diumumkan dan memohon bagi penangguhan pelaksanaan penghakiman. Permohonan tersebut belum dibicarakan. Dalam Guaman Jelebu, pembelaan dan tuntutan balas dibatalkan dan penghakiman dimasukkan berpihak kepada plaintif tertakluk kepada taksiran oleh penolong kanan pendaftar. Permohonan defendan untuk mengenepikan penghakiman ditolak awal-awal lagi dan keputusan ini dikekalkan oleh Mahkamah Rayuan. Permohonan defendan bagi kebenaran untuk merayu ke Mahkamah Persekutuan ditolak. Taksiran ganti rugi juga belum dijadualkan untuk perbicaraan. Plaintif, dalam tindakan ini memohon, antara lain, satu injunksi fortuna untuk menghalang defendan daripada mengemukakan petisyen untuk menggulungkan plaintif. Plaintif menghujahkan bahawa ia mempunyai tuntutan bersilang yang sah daripada penghakiman interlokutori tersebut. Menurut plaintif, ia terlibat secara aktif dalam projek-projek pembinaan dan, jika tidak dihalang, prosiding penggulungan yang mengancam akan menyebabkan kerugian yang tidak boleh diperbaiki kepada plaintif.

Diputuskan, membenarkan permohonan atas terma-terma dan tanpa perintah terhadap kos:

(1) Di mana hutang tidak dipertikaikan, satu injunksi untuk menghalang pengemukaan petisyen untuk menggulungkan sebuah syarikat akibat kegagalan membayar hutang yang dituntut kebiasaannya ditolak. Hujahan-hujahan yang mencabar pengeluaran notis s 218 sepatutnya dibuat dalam mahkamah penggulungan. Jika tidak, satu-satunya pilihan yang dilaksanakan adalah dengan membayar semula. Di mana hutang tidak dipertikaikan, satu injunksi boleh diperintahkan di mana tuntutan bersilang yang sah berdasarkan alasan-alasan bersebab dibangkitkan. Dalam kes sedemikian, mahkamah mengiktiraf bahawa pengemukaan petisyen sedemikian mungkin menghasilkan kerosakan yang tidak boleh diperbaiki ke atas perniagaan dan reputasi (lihat perenggan 49).

(2) Beban pembuktian dalam kedua-dua keadaan hutang yang dipertikaikan dan hutang yang tidak dipertikaikan adalah sama ada terdapat kemungkinan bahawa petisyen penggulungan akan gagal atau adalah tidak mungkin bahawa perintah penggulungan dibuat; bertentangan dengan ujian bahawa petisyen tersebut mungkin gagal (lihat perenggan 49).

(3) Tuntutan bersilang tersebut adalah bersifat penghakiman interlokutori. Tuntutan bersilang sedemikian sememangnya bukan sahaja benar, tulen dan serius tetapi juga berdasarkan alasan-alasan bersebab. Walaupun defendan mungkin mendapat penghakiman akhir selepas perbicaraan penuh, penghakiman interlokutori yang terletak dalam tangan plaintif

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dan yang diawardkan berpihak kepadanya tidak kurang merupakan satu penghakiman kompeten mahkamah. Penghakiman tersebut telah pun sebenarnya disahkan secara tidak langsung oleh Mahkamah Persekutuan apabila kebenaran untuk merayu oleh defendan ditolak; dan secara langsung oleh Mahkamah Rayuan (lihat perenggan 51).

(4) Dalam Guaman Jelebu, Mahkamah Tinggi telah memasukkan penghakiman mengenai liabiliti terhadap defendan. Ganti rugi, juga ada, adalah ke atas plaintif, adalah perkara taksiran oleh penolong kanan pendaftar. Melihatkan pada hal keadaan ini, ia tidak boleh dikatakan bahawa penghakiman adalah mengelirukan dan tidak tetap; atau adalah satu perintah yang belum menjadi penghakiman. Hanya kerana bahagian kewangan penghakiman dalam Guaman Jelebu belum ditaksir tidak menjadikan penghakiman tersebut satu penghakiman mahkamah yang tidak lengkap (lihat perenggan 52).

(5) Rayuan plaintif kepada Mahkamah Rayuan dalam Guaman Port Dickson masih tergantung. Plaintif telah memfailkan satu permohonan untuk menangguhkan penghakiman dalam Guaman Port Dickson. Walaupun ini secara amnya adalah tidak relevan, ia material apabila asas fakta dilihat secara sepenuhnya dalam perspektif yang betul (lihat perenggan 54).

(6) Defendan oleh itu terhalang daripada mengemukakan petisyen penggulungan berkenaan Guaman Port Dickson tertakluk kepada pembayaran oleh plaintif dalam dua minggu daripada tarikh perintah pembayaran penuh yang diberikan kepada peguamcara plaintif untuk dipegang sebagai pemegang amanah sementara menunggu taksiran ganti rugi di dalam Guaman Jelebu (lihat perenggan 58).]

Notes

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1375–1394.

Cases referred to

A Company, Re [1992] BCC 794, Ch D (refd)
A Company, Re [1993] BCLC 131, Ch D (refd)
Bayoil SA, Re, Seawind Tankers Corp v Bayoil SA [1999] 1 WLR 147, CA (refd)
Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of The Commonwealth of Australia [1978] VR 83, SC (refd)
Glenbawn Park Pty Ltd, Re (1977) 2 ACLR 288, SC (consd)
Hadkinson v Hadkinson [1952] 2 All ER 567, CA (refd)
Isaacs v Robertson [1984] 3 All ER 140, PC (refd)
LHF Wools Ltd, Re [1970] 1 Ch 27, CA (refd)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (consd)

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Mann and Another v Goldstein and Another [1968] 2 All ER 769, Ch D (refd)
Metalform Asia Pte Ltd v Holland Leedon Pte Ltd [2007] SGCA 6, CA (consd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)
Montgomery v Wanda Modes Ltd [2002] 1 BCLC 289, Ch D (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95; [1991] 1 CLJ 260, SC (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2011] 1 CLJ 947, CA (consd)
Pacific Recreation Pte Ltd v Technology Inc and Another Appeal [2008] SGCA 1, CA (consd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343, SC (refd)
People Realty Sdn Bhd v Red Rock Construction Sdn Bhd [2008] 1 MLJ 453; [2008] 1 CLJ 632, CA (consd)
Pontian United Theaters Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602; [2006] 1 CLJ 1067, CA (consd)
Portman Provincial Cinemas Ltd, Re [1999] 1 WLR 157n, CA (refd)
RHB Bank Bhd v Pembinaan MCP Sdn Bhd [2002] MLJU 597; [2003] 5 CLJ 335, HC (refd)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509, SC (refd)
Zalam Corporation Sdn Bhd v Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705, CA (consd)

Legislation referred to

Companies Act 1965 s 218, 218(1)(e), (2), (2)(a)
Courts of Judicature Act 1964 s 73

N Rajentharan (GH Tee & Co) for the plaintiff.
Ben Chan (Norasyikin bt Amirruddin with him) (Mah-Kamariyah & Philip Koh) for the defendant.

Mary Lim J:

INTRODUCTION

[1] The parties agreed that encls 1 and 2 be taken together seeing that the orders sought in the interlocutory application are substantively similar to those in the main action. In encl 1 the plaintiff seeks several declaratory orders and an order of restraining the defendant from, inter alia, presenting a petition to wind up the plaintiff. In short, it seeks a fortuna injunction, taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of The*

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Commonwealth of Australia [1978] VR 83. The action is resisted.

BACKGROUND FACTS

[2] These are the relevant facts that would assist in understanding and appreciating the applications. The plaintiff and defendant are involved in two cases before the High Court at Seremban. For ease, I shall refer to them as the 'Port Dickson Suit' (Writ Summons No 22–74 of 2003) and the 'Jelebu Suit' (Writ Summons No 22–2 of 2004) respectively.

[3] In the Port Dickson Suit, the defendant was the main contractor for the construction project known as the 'upgrading of existing Port Dickson Polytechnic, Port Dickson, Negeri Sembilan'. The plaintiff was the defendant's subcontractor in respect of earthworks and site office. After full trial, the plaintiff's claim was dismissed and the defendant's counterclaim allowed on 16 January 2013. By letter dated 30 January 2013, the defendant issued a notice pursuant to s 218 seeking payment for the sum ordered by the court.

[4] The plaintiff filed an appeal on the same day that judgment was pronounced. It has filed an application for stay of the execution of the judgment. A date has yet to be fixed for its hearing.

[5] In the Jelebu Suit, the plaintiff sued the defendant for damages for unlawful termination of its employment as subcontractor. The damages claimed substantially relate to certified and uncertified value of works done, alleged wrongful call on the performance bond; claim for retention monies; value of materials left on site, loss of profit and financing charges. On 6 February 2007, the defence and counterclaim was struck out and judgment in the plaintiff's favour as per paras 9.1(a) to 9.1(l)(iii) were entered subject to assessment by the senior assistant registrar ('the SAR'). The defendant appealed and then withdrew its appeal on 14 October 2008. It also applied to set aside the judgment. It was refused at first instance and that decision was upheld by the Court of Appeal on 16 August 2011. The defendant's application for leave to appeal to the Federal Court was refused on 14 February 2012.

[6] Meanwhile, the assessment of damages has yet to be scheduled for hearing but the parties have been attending case managements. The plaintiff claimed that it had recently filed six volumes of documents to support its assessment of loss and damage. Witness statements have also been prepared, including the assistance of an accountant is said to have been engaged to compute the plaintiff's claims for various financing and interest charges. The plaintiff claims that by virtue of the order of court entering judgment in its favour, and from the evidence that it has and will present at the assessment of its claims, it is apparent that the total sum of its claim will far exceed that

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adjudged in the defendant's favour in the Port Dickson Suit. That being so, and upon setting off the amount owing to the defendant, the defendant will in fact owe the plaintiff a substantial sum.

THE PLAINTIFF'S CONTENTIONS

[7] For the reasons set out above, the plaintiff claims it has what it says amounts to a valid cross-claim from the interlocutory judgment entered in 2007. The plaintiff argued that the Jelebu case is a genuine and serious cross-claim. As such, it is good as a disputed debt relying on the decisions in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; *Pontian United Theaters Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602; [2006] 1 CLJ 1067; *Re LHF Wools Ltd* [1970] 1 Ch 27; *Re Glenbawn Park Pty Ltd* (1977) 2 ACLR 288; *Re Portman Provincial Cinemas Ltd* [1999] 1 WLR 157n. After conclusion of submissions, the plaintiff offered two more authorities in support, namely *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] SGCA 6 and *Pacific Recreation Pte Ltd v Technology Inc and Another Appeal* [2008] SGCA 1.

[8] From these cases, the plaintiff contended that the defendant is not a creditor within the meaning of s 218 of the Companies Act 1965. Under such circumstances, the issuance of the s 218 notice and the petitioning of a winding up of the plaintiff are amount to abuse of court process.

[9] The plaintiff also alleged that despite being warned to withdraw the notice, the defendant has not done so. This in turn is said to support the plaintiff's contention that the winding up proceedings are initiated for a collateral mala fides purpose of jeopardising the assessment proceedings in the Jelebu Suit.

[10] It is the plaintiff's case that it is actively involved in construction projects. If not restrained, the threatened winding up proceedings will occasion irreparable damage to the plaintiff's reputation which cannot be compensated monetarily. It also claimed that its commercial reputation will be damaged; projects currently being undertaken will be jeopardised as bank accounts will be frozen; the interests of the suppliers and subcontractors involved will be affected; banking facilities will be withdrawn or retracted thereby interrupting business operations; untold losses will be suffered; and finally, damage, harm and hardship will be caused to the plaintiff and indirectly others who are in business with the plaintiff which damage, harm and hardship cannot be compensated monetarily — see the Supreme Court's decision in *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509.

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A THE DEFENDANT'S RESPONSES

[11] The essence of the defendant's arguments is that the law on s 218(1)(e) and (2)(a) of the Companies Act 1965 are very well settled. Once a debtor does not or neglects to pay the demanded debt or to secure or compound for the debt to the defendant's satisfaction within three weeks of the service of the notice, the company is deemed to be unable pay its debts. The defendant, as creditor is then entitled to present a petition to wind up the defendant under s 218(1)(e) of the Companies Act 1965.

[12] Directing this court's attention to the recent decision of the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947, the defendant maintained that the defendant's right to initiate winding up proceedings are substantive rights conferred under s 218(1)(e) and (2). The proper exercise of that right cannot amount to abuse of court process.

[13] In seeking a fortuna injunction, the plaintiff must satisfy two limbs. First, that the intended petition has no chance of success. Second, the presentation of such a petition might produce irreparable damage to the company. Learned counsel for the defendant submitted that this principle however, only applies when dealing with disputed debts. It does not apply where the debt is undisputed which is the case here.

[14] The defendant creditor is relying on a valid and enforceable judgment. Where that is the case, whether or not irreparable damage is caused is of no consequence. The defendant is at liberty to exercise in enforcing the judgment debt and such an exercise cannot amount to abuse of process. This position remains regardless of the plaintiff's appeal against the decision in the Port Dickson Suit because appeals do not operate as a stay. This is prescribed under s 73 of the Courts of Judicature Act 1964 (Act 133).

[15] Even if the plaintiff appears solvent, the defendant argued that the court would not generally interfere even though the plaintiff appears solvent. The fear of losing or fear of losing business are said to be avoidable by the simple act of 'paying up' — see *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380.

[16] So, while the defendant has judgment in hand, the defendant describes the plaintiff's claim as one that 'remains illusory and uncertain since it still has to go through the process of litigation before it could eventually graduate into a judgment' quoting the words of Nik Hashim JCA (as he then was) in *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd* [2008] 1 MLJ 453; [2008] 1 CLJ 632. This case was cited with approval in *Zalam Corporation Sdn Bhd v Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705. The defendant also

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claimed that the Jelebu Suit is an unrelated suit and therefore had no bearing whatsoever on the defendant's actions.

[17] Finally, the defendant argued that the proper forum to consider the purported claims in the Jelebu Suit is at the hearing of the winding up petition when it is presented. The winding up court would be able to consider the purported claims and determine whether it should use its discretion to order a winding up or otherwise. Since there is doubt as to whether the plaintiff would be awarded any damages; or even assuming that there is judgment in the plaintiff's favour, there is no telling that such judgment will exceed the amount claimed under the s 218 notice. The court would be invited to participate in speculative exercises which the court ought to decline or refrain from so doing. On all of these grounds, the defendant submitted that the application and the summons must be dismissed.

FINDINGS OF THE COURT

[18] The proper place to start must be the applicable principles. I have carefully examined the substantial body of case law here and having anxiously combed through them, I find that there is actually no decision concerning facts and parties similarly circumstanced.

[19] There is an urgent need to appreciate the factual background and prevailing conditions against which the several decisions that have been cited were in fact made. When the Court of Appeal in *Zalam Corporation Sdn Bhd v Dolomite Readymixed Concrete Sdn* discussed its own earlier decisions of *Pontian United Theaters Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* and *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd*, it however did not discuss the Privy Council's decision earlier in *Malayan Plant*. In its recent decision in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy*, the Court of Appeal did not discuss *Zalam Corporation*'s case. So, where then do these cases stand in relation to one another.

[20] Starting with the Privy Council's decision in *Malayan Plant (Pte) Ltd* which is really relevant for the present purposes in reminding the court of the 'Buckley concept' in exercising discretion in winding up petitions as opposed to the 'modern concept as propounded by the Court of Appeal in *In re LHF Wools Ltd*.' The 'Buckley concept' deals with 'commercial insolvency', that is, of the company being unable to meet current demands upon if. Although *Wools*' case was cited, the arguments on cross-claims were not deliberated. The decision really was about the exercise of discretion in winding up petitions. It was in this respect that the Privy Council held that there was no misuse of discretion on the part of the Chief Justice who had ordered the winding up of

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the appellant. It further found that there was '... no distinction in principle between a cross claim of substance (such as in the *Wools* case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding up' — see p 55.

[21] Moving on to the Court of Appeal's decision in *Zalam Corporation*'s case. There, the appellant was the first defendant in a suit brought by the respondent. It filed its defence and added a counterclaim. It then sought to enter summary judgment in respect of a part of its counterclaim. It was refused by the learned senior assistant registrar. The High Court allowed Zalam's appeal and entered summary judgment. The respondent appealed. Pending disposal of the appeal, it sought a stay which was refused by the High Court. The respondent lost its appeal before the Court of Appeal. Zalam then issued a statutory notice under s 218 of the Companies Act 1965. The respondent applied for a fortuna injunction which was granted.

[22] Zalam appealed. In allowing the appeal, the Court of Appeal made observations on cross-claims and examined its earlier decisions in *People Realty*'s case and *Pontian United Theaters*'s case. It chose to follow *People Realty*'s case but not *Pontian United Theaters*'s case. And, this is how it resolved those decisions.

[23] Starting with its decision in *People Realty*'s case. In that case, the statutory notice issued under s 218 of the Companies Act 1965 was upon a judgment. After the notice had been issued but before the presentation of a winding up petition, the plaintiff filed a cross-claim and applied for a fortuna injunction. But, before both the cross-claim and the application for injunction were filed, the plaintiff's application for a stay on the execution of the judgment had already been refused by both the High Court and the Court of Appeal. It was in this context that Nik Hashim JCA (as he then was) observed:

> ... The respondent's winding up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross-claim dismissed the appellant's application for stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross-claim and determine whether it should exercise its discretion to order winding up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded with by the liquidator under s 236(2) of the Act ... Thus, to consider the cross claim, which is a separate action altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage.

[24] Although the decisions of *Malayan Plant*'s case and *Re Bayoil*'s case were

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drawn to the Court of Appeal's attention, the Court of Appeal in *People Realty*'s case went on to say that 'the test in *Re Bayoil* regarding cross-claim is not applicable because it was decided upon consideration of a foreign statute. The case, like Malayan Plant ... also fortifies the view that the power of the court to dismiss or stay the petition is to be exercised only 'on the hearing of the petition and not earlier'. Therefore the need to show special circumstances why the appellant should be would up before the cross-claim is determined does not arise'.

[25] The Court of Appeal also agreed with the respondent there that 'the cross-claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment ... Even if there exists the cross-claim, the petition should not be struck out in limine and should be heard on its merit' — see p 639 citing *RHB Bank Bhd v Pembinaan MCP Sdn Bhd* [2002] MLJU 597; [2003] 5 CLJ 335, and *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; [1991] 1 CLJ 260. In short, the position taken was that the dispute was to be settled at the hearing of the petition and not earlier or elsewhere.

[26] The Court of Appeal in *Zalam Corporation*'s case opined that its approach in *People Realty*'s case was consistent with that taken by Millet J in *Re a Company* [1993] BCLC 131 who found that:

> ... The existence of a cross-claim will be relevant to the exercise of a court's discretion on the hearing of the petition. The discretion will be exercised in the light of all relevant circumstances then existing. In *Re Leasing & Finance Service Ltd* [1991] BCC 29, Morritt J pointed out that it could not be said at the preliminary stage when an application was made for an injunction to restrain the presentation of a petition that the existence of the cross-claim meant that the petition was bound to fail when it came to be heard after advertisement and in the light of the evidence available.

[27] Therefore, it can be seen that in *People Realty*'s case, the matter of the cross-claim was raised not only after judgment had been entered but after the s 218 notice had been issued. Under such circumstances, it is not surprising that the Court of Appeal set aside the injunction granted; and decided further that the matter was to be addressed at the hearing of the winding up petition.

[28] As for its other decision in *Pontian United Theatre*'s case, these were the material facts. The s 218 notice was issued based on a final but summary judgment. There was an appeal but no stay. The appellant however, had a counterclaim for a sum larger than the amount underlying the petition. The counterclaim had not been decided at the material time. In opposing the petition, the appellants claimed that their counterclaim was meritorious and if

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a winding up order was made against them, it would prevent them from prosecuting their counterclaim; causing them 'great injustice'. Those arguments were rejected by the High Court who took the view that the counterclaim was a separate matter and did not affect the respondent's entitlement of enforcement of the order.

[29] The decisions of *Re LHF Wools Ltd, Re Portman Provincial Cinemas Ltd and Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* as well as several others were considered by the Court of Appeal in *Pontian United Theatre* as cases ' ... in which the winding up petition was dismissed or stood over because of the existence of a counterclaim which equaled or exceeded the debt on which the petition was based' — see p 1075. The court took time to appreciate the meaning and implication of genuine cross-claims with substance as opposed to those without any. If there was present the latter, quoting Lord Denning in *Re LHF Wools*, '... then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim'. Otherwise, where the cross-claim is genuine with substance and where the amount equals or exceeds the debt on which it is based, the winding up petition must be rejected.

[30] What is overlooked is that after making those observations, the Court of Appeal finally dismissed the appeal on the ground that the cross-claim was not proved on the facts. The court decided that it was not 'sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counterclaim exhibit for proof the statement of defence and counterclaim, which is not evidence. Evidence is required' — see p 1077.

[31] Again, it can be appreciated why given this factual background that the Court of Appeal in *Zalam Corporation*'s case expressed the view that did not believe its earlier decision in *Pontian United Theatre*'s case laid down any proposition that the mere existence of a cross-claim sufficed as a basis for the grant of an injunction to restrain the filing of a winding up petition. It further concluded that its earlier views were actually articulated in the winding up proceedings itself and not, in proceedings to restrain the filing of a petition. The decision in *Pontian United Theater* was therefore unrelated with applications to restrain the presentation of winding up petitions.

[32] As for the facts and circumstances in *Zalam Corporation* itself, the Court of Appeal found that the facts in the presented case were similar to those in *People Realty*. The notice was based upon a judgment debt, and the stay of execution had been refused. Under such circumstances, a cross claim which had yet to be determined and the implications it purportedly bring to the respondent's case was considered by the Court of Appeal to be irrelevant and could not be accepted as reason for the appellant's refusal to settle the demand — see p 716. Where a notice is founded upon a valid and enforceable

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judgment, it was not abuse of court. The case of *Mann and Another v Goldstein and Another* [1968] 2 All ER 769 was cited in support of the principle that the solvency of the company is not a relevant consideration at the hearing of a fortuna injunction. That question would be more appropriately dealt with at the hearing of the winding up petition. The court then concluded that it could not agree that the petitioning to wind up a company upon a final judgment which has not been stayed amounts to abuse of process.

[33] In the recent Court of Appeal's decision in *Pacific & Orient*'s case, this position was maintained. The appellant was the insurer of the motorcyclist that was involved in a motor vehicle accident with the respondent. After trial, the sessions court dismissed the respondent's claim. The respondent appealed. At the High Court, the respondent's appeal was allowed and the insured was found to be totally liable for the accident; and was ordered to pay a sum of RM89,374.03. The appellant's application for leave to appeal was allowed. A notice of appeal was then filed. An application for stay was also filed before the High Court. While all this was happening, the appellant, as insurer did not pay against the judgment. So, the respondent issued a notice under s 218 of the Companies Act 1965 requiring payment of the judgment debt. The appellant then applied for an ex parte injunction to restrain the respondent from proceeding to present a winding up petition. The High Court allowed the application on terms that the judgment sum be paid into court. The appellant complied.

[34] On the inter parties hearing, the application was dismissed and the earlier order was discharged.

[35] The Court of Appeal was unequivocal in its opinion that once a monetary judgment has been entered, the debt ceases to be a disputed debt. At p 958, the Court of Appeal opined:

> The status of the judgment on the insurer under s 96(1) of the Road Transport Act 1987 is the same with status of the said judgment on the insured earlier granted in favour of the respondent. Unless set aside or stayed by proper authority, the said judgment remains. Upon the respondent obtaining the judgment against the insured, the debt ceases to be a disputed debt. Thereafter, the question whether the debt or amount due was bona fide disputed became non-issue. This is so even though the appellant had filed an appeal against the said judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. The filing of an appeal does not make a valid and enforceable judgment a disputed debt — see *SBSK Plantations Sdn Bhd v Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329 — p 958.

[36] The Court of Appeal was emphatic in pronouncing that:

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> The right of the respondent to initiate winding up proceedings against the appellant in this case, is a substantive right conferred by substantive law ie, s 96(1) of the Road Transport Act 1987, read together with ss 217(1)(b); 218(1)(e) and 218(2) of the Companies Act 1965. Neither procedural law nor inherent jurisdiction of the court can deprive the respondent of that right. The proper exercise of that right by the respondent by issuing the 218 notice as in the present case, cannot amount to abuse of court process ...

[37] It is noted that the Court of Appeal further opined that the principle of ascertaining first whether irreparable damage may be caused to a company upon the issuance of a 218 notice and whether the proposed petition had any chance of success had no application when dealing with a valid enforceable judgment: see para 27 at p 959. Although the Court of Appeal expressed some views on how the winding up petition would be treated, and the possible arguments that may be raised it concluded at p 962 that:

> Prima facie, a creditor who is not paid has a right to file a petition for a winding up whatever may be his motives.

[38] The court then addressed the concern of fear of irreparable damage if the injunction is not granted with a strong reminder from *Ming Ann Holdings* that if a party fears irreparable damage if the injunction prayed for was not granted and a host of other fears:

> ... All that the applicant has to do to avoid such 'fears' is to settle the judgment debt. These factors are not 'special circumstances' or do they show that the appeal, if successful, will be rendered nugatory. They are nothing unusual. Execution is a natural process after obtaining a judgment and winding-up is one of them.

[39] The plaintiff had also cited *Re Portman Provincial Cinemas Ltd* [1999] 1 WLR 157n; *Bayoil SA, Re, Seawind Tankers Corp v Bayoil SA* [1999] 1 WLR 147; and *Montgomery v Wanda Modes Ltd* [2002] 1 BCLC 289. In these decisions, the debts upon which the winding up petitions were founded were disputed on the basis of there being genuine and serious cross-claims. Where that is the case, the debts are treated as disputed debts in which case, the petitioners are not considered creditors capable of presenting valid winding up petitions.

[40] The position is no less different in Australia. In the Supreme Court of New South Wales' decision in *Re Glenbaum Park Pty Ltd* [1977] 2 ACLR 288 at p 291, when dealing with the question of whether there was a distinction between cross-claims arising from liquidated and unliquidated claims, Yeldham J opined that:

> I see no reason for any distinction for present purposes between a defendant who has no defence to a liquidated claim against him but has a liquidated claim himself against the plaintiff for a greater amount, which he can clearly set off, and in respect

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> of which he can recover any excess proved on the one hand, and one whose claim is unliquidated. In the latter event, whether or not it is, in accordance with modern decisions, available as an equitable set-off, the court has power, which it would generally exercise, to stay any proceedings upon which the upon the plaintiff's claim until the defendant's unliquidated claim has been heard.

[41] Once again, that view was expressed in the winding up proceedings itself, albeit in an application to dismiss the petition. The court was of the opinion that it was not so much whether the counterclaim was for a liquidated or unliquidated claim, and whether it arose out of the same transaction. Rather, whether it was '... based upon substantial grounds'; and where it was, it could be '... relied upon to support an argument that the company's alleged debt is disputed'.

[42] Closer to home and in the more recent decisions of *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* and *Pacific Recreation Pte Ltd v Technology Inc and Another Appeal*, the Court of Appeal of Singapore adopted the same approach.

[43] In *Metalform Asia*'s case, the undisputed debt of S$25m arose from the sale and purchase of raw materials in the form of steel. Prior to the service of the equivalent s 218 notice, the appellant had attempted unsuccessfully to settle the undisputed debt. Subsequently, the appellant raised a cross-claim of S$34m founded on breach of warranties in relation to an agreement between the parties who were actually involved in a sale and purchase of shares of the defendant's business and assets to the appellant by way of a leveraged buyout. Similarly, the appellant had applied for an injunction to restrain the respondent from presenting a petition to wind up the appellant. The application was refused.

[44] In allowing the appeal, the Court of Appeal carefully examined the factual background; how the parties and their respective group of companies and the various individuals came to be involved with one another; the several agreements made; how the dispute arose, how the cross-claim arose; as well as conduct of the parties, in particular that of the appellant, before concluding that the cross-claim was indeed genuine based on such substantial grounds. The court also carefully examined the applicable principles, and compared the practice before the courts in Singapore, England (including the two divergent English decisions of *Re a Company* [1992] BCC 794 and *Bayoil SA, Re, Seawind Tankers Corp v Bayoil SA* [1999] 1 WLR 147), Australia and New Zealand; especially with regard to cross-claims equaling to or exceeding the undisputed debt on the matter; and the standard of proof in cases of undisputed debt and cross-claim. Writing for the court, the Chief Justice observed that the current practice in England, Australia and Singapore in relation to the standard of proof:

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> ... the company does not have to show that the winding up petition is bound to fail, but that there is a likelihood that it may fail or that it is unlikely that a winding up order would be made.

[45] His Lordship noted at para 80 at p 296 of the judgment that the courts in New Zealand applied a 'bound to fail' test 'before the Court will exercise its inherent jurisdiction to restrain the creditor of an undisputed debt from presenting a petition against it'. However, this test was rejected as the 'wrong test to apply in cross-claim cases, whether the debt is disputed or undisputed. As a matter of evidence, until the cross-claim is tried, it would be impossible to tell what the decision of the court would be, either on the merits of the cross-claim or whether the quantum would equal or exceed the undisputed debt. Applying such a stringent test at the hearing of any application to restrain a winding-up petition would effectively lead to the dismissal of the application. It would amount to applying a principle of law rather than a principle of evidence' — see para 86 at p 298.

[46] When invited by the respondent's counsel to reconsider the legal position in Singapore and adopt the New Zealand approach, His Lordship set out the following policy at p 296:

> ... The policy concerns may be stated to be as follows. First, a creditor who has an undisputed debt has a statutory right to file a winding-up petition against a company which has failed to pay the debt. It is not an abuse of process of the court for him to invoke his statutory rights. Therefore, there is no basis for the court to restrain him from filing his petition. Secondly, as there is also no abuse of process even where the company claims that it has a serious cross-claim on substantial grounds, the court should not prevent the petition from being filed but determine whether it should be stayed or dismissed on hearing the petition. Otherwise the company would be allowed to litigate the same issue twice, leading to an unnecessary prolongation of such proceedings. Furthermore, such restraining orders have the potential of defeating the rights of creditors who may not have the same financial resources as the company, thereby denying them equal access to the court after a pre-emptive strike.
>
> 82 In our view, we do not think that these matters outweigh the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds. Such a petition may adversely affect the reputation and the business of the company and may also set into motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. So long as the court is satisfied that on the evidence there is a distinct possibility that the cross-claim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition. Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover.

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[47] For those reasons, the Court of Appeal found, inter alia, that since the appellant had a genuine cross-claim based on substantial grounds, the filing of a winding-up petition was likely to cause irreparable harm to the appellant's business and reputation.

[48] When dealing with the standard of proof applicable for determining the existence of a substantial and bona fide dispute in winding up proceedings in the following year in the case of *Pacific Recreation Pte Ltd v Technology Inc*, the Court of Appeal referred to *Metalform Asia* and reiterated its stand that 'the courts should not be quick to condemn viable companies which have plausible responses to claims made against them'.

[49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s 218 notice should also be made in the winding up court. Otherwise, the only viable option is to pay up. Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.

[50] Further, it is easy to appreciate the reasons why the courts in the cases discussed were disinclined to grant injunctive relief when dealing with cross-claims. Unlike judgments of the court, cross-claims have not crystallised into the final and binding status enjoyed by judgments pronounced by the court. Even arbitration awards are not spared. In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295, the Court of Appeal opined that the arbitration award upon which the 218 notice was issued was not final and binding. In which case, there is a bona fides dispute as to the debt. All that the defendant had there was a cause of action at common law to enforce the award in the usual way by means of a civil suit.

[51] Be that as it may, in none of the factual scenarios above were any of the courts dealing with an undisputed debt that arises from a valid and binding judgment. To compound matters, in none of the cases considered was the cross-claim in the nature of an interlocutory judgment. Such a cross-claim is certainly not only real, genuine and serious but based on substantial grounds. While the defendant may have a final judgment after a full trial, the interlocutory judgment in the plaintiff's hands and awarded in its favour is no

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less a valid judgment of a competent court. That judgment had in fact been confirmed indirectly by the Federal Court when the defendant's leave to appeal was dismissed; and directly, by the Court of Appeal. This single factor cannot be ignored or, brushed aside.

[52] In the Jelebu Suit, the High Court had entered judgment on liability against the defendant here. What damages, if any, was due to the plaintiff was a matter of assessment by the senior assistant registrar. Given these circumstances, it cannot be said that the judgment is 'illusory' and 'uncertain'; or is an order that 'has yet to graduate into a judgment'. What the interlocutory judgment had to 'graduate to' is a final judgment where the sum(s), if any, as awarded by the SAR are included. Such a situation is entirely dissimilar from all the fact patterns presented in the cases cited.

[53] Just because the monetary part of the judgment in the Jelebu Suit has not been assessed does not make that judgment any less a judgment of the court. The defendant has moved with speed in realising the judgment granted in its favour. No doubt there is no stay; but, it is irrefutable that an application for a stay has been filed. It is also irrefutable that an appeal has been filed. However, as at the time of these proceedings, dates for both hearings have not been secured as yet.

[54] Further, I take note that the plaintiff's appeal to the Court of Appeal in the Port Dickson Suit is pending. The plaintiff has filed an application to stay the execution of the judgment in the Port Dickson Suit. While this is generally not relevant, it is material when the factual matrix is viewed in its entire and proper perspective. As for the assessment of damages in the Jelebu Suit, I understand it is now at the stage of preparation of substantial bundles of documents. This is not disputed.

[55] Insofar as the judgment in the defendant's hands is concerned, it goes without saying that like everyone else, the plaintiff is plainly and unqualifiedly duty bound to respect and obey the order made by a competent court unless and until it is discharged. The plaintiff cannot suggest otherwise. This reminder of litigant's obligation was expressed by the Supreme Court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343) after citing Lord Diplock in *Isaacs v Robertson* [1984] 3 All ER 140 who had himself cited Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567. But, in the same decision, the Supreme Court also recognised at p 345, that until it is set aside, a default judgment is a good and enforceable judgment. Hence, it is without doubt that the defendant must similarly respect the interlocutory judgment in the Jelebu Suit.

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[56] Going back to all the cases discussed earlier, the cross-claims that arose therein had either not been litigated or in some, just filed. That is not to say that that would have made any real difference as to evaluate a cross-claim which is genuine and based on substantial ground at this stage would be to prematurely determine the merits of that claim or litigate the issue twice as warned by the Chief Justice in *Metalform Asia*'s case. It would, therefore, not be appropriate to assess whether that cross-claim in the form and nature of the Jelebu Suit will yield an award which is equal or exceed the sum adjudged in the defendant's favour in the Port Dickson Suit.

[57] Given all these conditions and the total factual background and the interplay of the Port Dickson Suit and the Jelebu Suit, these are undeniably substantial grounds that more than indicate that the cross-claim raised by the plaintiff is not only genuine but bona fide. In such circumstances, an injunction ought to be ordered, but on terms.

[58] The defendant is therefore restrained from presenting a winding up petition in respect of the Port Dickson Suit subject to the plaintiff paying within two weeks from the date of this order, that is, on or before 5 April 2013, the full sum adjudged to the solicitors of the plaintiff to be held as stakeholders pending assessment of damages in the Jelebu Suit. Given the peculiar circumstances of this case, I further do not believe it appropriate to make any order on costs.

Application allowed on terms and with no order as to costs.

Reported by Kanesh Sundrum